

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARI EAST)	
Claimant)	
)	
VS.)	
)	
AT&T, INC.)	
Respondent)	Docket No. 1,038,489
)	
AND)	
)	
AMERICAN HOME ASSURANCE)	
Insurance Carrier)	

ORDER

Claimant requests review of the June 30, 2008 Temporary Preliminary Order entered by Administrative Law Judge (ALJ) Robert H. Foerschler.

ISSUES

Following a preliminary hearing the ALJ issued an Order stating that "[i]t is not considered in the claimant's best interest to order respondent to provide the medical treatment now."¹

The claimant has appealed this Order alleging that by failing to grant her request the ALJ "has totally abdicated his statutory responsibility to determine the issues required of him by K.S.A. 1997 supp. 44-534a(1)."² Claimant is asking the Board to remand this matter back to the ALJ for a determination on the issues.³

¹ ALJ Order (June 30, 2008).

² Claimant's Brief at 1 (filed Aug. 5, 2008).

³ Robert Foerschler was the ALJ that heard this matter. Since the date of the Order, he has retired and has since been replaced by Marcia Yates Roberts.

Respondent argues that the ALJ should be affirmed. Respondent contends that the ALJ's order is wholly supported by the facts and evidence.⁴

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was originally employed in a sedentary job in respondent's St. Louis, Missouri office. In November 2006 she transferred to Kansas City, Kansas to work as a field service technician and her duties included installing cable lines. This job required her to engage in fine detailed work with her hands, lift ladders, crawl and climb into attics, and lift a variety of weights of equipment.

On Saturday, October 13, 2007, the claimant was working her normal work duties as a cable installer. At the end of her 13 hour shift she noticed she was fatigued and achy. She returned home and went to bed. The next morning, Sunday, October 14, 2007, claimant awoke to get ready for work and again noticed she was not feeling well. She began vomiting and had back pain but still managed to go to work. During the course of that day she returned to her local office in the hopes her nausea would subside. Although the nausea lessened she noticed that her back pain began to increase. Claimant testified that she told her boss, Steve Reynolds, that she was in pain and wanted to go home. This was the last time she worked for respondent.

Claimant sought treatment on October 15, 2007 from her own physician. She did not report any work-related injury and was instead diagnosed with possible food poisoning or a reaction to a flu shot. Claimant was given physical therapy and advised to take a few days off work. Eventually, claimant sought short term disability through her employer and those benefits began October 21, 2007.

At her lawyer's request claimant was examined by Dr. Fernando Egea on March 31, 2008. Dr. Egea opined that within a reasonable degree of medical certainty, that the type of work and the sudden changes in the claimant's position at work was the direct, proximate and prevailing factor in causing her to have lumbar herniated discs.⁵ He felt that the claimant was not at maximum medical improvement, and is in need of further evaluation by an orthopaedic surgeon and should have a lumbar myelogram and CT scan. He stated that his opinion is that the claimant will not be able to work until her herniated discs are removed. Finally, Dr. Egea assigned restrictions of no frequent bending, turning, twisting, crawling, squatting, kneeling, climbing stair and or crouching, no standing for

⁴ Respondent's Brief at 1 (filed Aug. 13, 2008).

⁵ P.H. Trans., Ex. 2 at 5 (Dr. Egea's Mar. 31, 2008 IME Report).

periods over 15 minutes without resting for 10 minutes, no sitting for periods over 15 minutes without standing for 10 minutes, no walking over 15 minutes with resting for 10 minutes and no lifting over 10 pounds and no repetitious or frequent lifting. Respondent cannot accommodate these restrictions.

Claimant sought workers compensation benefits, filing her application for hearing on January 30, 2008. When medical treatment and temporary total disability benefits were not forthcoming, claimant sought a preliminary hearing. That hearing was held on June 26, 2008. When that hearing commenced, there was no recitation of the issues in dispute, nor were any stipulations taken. Rather, the ALJ simply opened up the record and with little meaningful discussion directed the claimant to testify. It became clear during the course of the hearing that claimant had been receiving medical treatment through her husband's private insurance company and had received short term disability benefits from her own carrier. Based upon the ALJ's final comments it appears that he believed the best course of action was to maintain the status quo and allow those providers to continue in spite of her workers compensation claim. He made no findings with respect to the requisite underlying compensability issues, nor is it clear from the record whether any or all of those were at issue.

Before any decision can be made on the ALJ's Order, the issue of jurisdiction must first be addressed. Not every order is appealable. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.⁶

⁶ See K.S.A. 44-551.

Claimant concedes this appeal does not, on its face, strictly involve one of the 4 statutory issues for appeal.⁷ However, if claimant's argument is interpreted broadly, she seems to be saying that the ALJ exceeded his jurisdiction in failing to make a decision, instead sloughing the burden of claimant's medical care and lost income on other sources rather than respondent's workers compensation carrier. But respondent contends that claimant never asserted a work-related claim until January 30, 2008 and that the contemporaneous medical evidence does not support a work-related injury occurred.

Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly but includes the power to decide it wrongly. The test of jurisdiction is not a correct decision but the right to enter upon inquiry and make a decision.⁸

The ALJ who decided this claim clearly had the jurisdiction to make a decision in this case. However, it is difficult to know, based upon this record, the basis of his decision. His *motivation* for denying claimant's request was, based on the record, most certainly a result of the ALJ's concern that claimant's short term disability benefits and medical treatment (both of which he viewed as more generous) would be suspended if he ruled in her favor. But claimant's "best interests" and the collateral source of her present benefits are irrelevant in terms of whether claimant sustained a compensable injury. Some decision has to be made as to the underlying compensability of the claim.

In sum, this record simply does not provide answers to the question of whether the Board has jurisdiction to review this appeal. And for that reason, this Board Member finds that this matter should be remanded to the ALJ for a decision on the compensability issues outlined in K.S.A. 44-534a.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁹ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

⁷ Claimant's Brief at 1 (filed Aug. 5, 2008) ("While the claimant acknowledges that this request for Review does not appear to fall directly within one of the four jurisdictional requirements of K.S.A. 1997 supp. 44-534a, this is because the judge has totally abdicated his statutory responsibility to determine the issues required of him by K.S.A. 1997 supp. 44-534a(1).")

⁸ See *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683, P.2d 902 (1984).

⁹ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Temporary Preliminary Order of Administrative Law Judge Robert H. Foerschler dated June 30, 2008, is set aside this matter is remanded to Judge Roberts for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this _____ day of September 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Lawrence G. Rebman, Attorney for Claimant
Brian J. Fowler, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge